Supreme Court, U.S.
FILED
DEC 29 1998
OFFICE OF THE CLERK

No. 98-719

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

SHEILA WARNOCK SEUS,

Petitioner,

vs.

JOHN NUVEEN & CO., INC.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

EDWARD C. JEPSON, JR.
Counsel of Record
JAMES E. BAYLES, JR.
VEDDER, PRICE, KAUFMAN
& KAMMHOLZ
Attorneys for Respondent
222 North LaSalle Street
Suite 2600
Chicago, Illinois 60601
(312) 609-7500

150154

Counsel Press LLC
FORMERLY LUTZ APPELLATE SERVICES
(800) 274-3321 • (800) 359-6859

24 pp

QUESTION PRESENTED

Whether the court below properly dismissed and compelled to arbitration before the National Association of Securities Dealers ("NASD") Petitioner's Title VII and ADEA claims, where Petitioner signed as a condition of her employment with Respondent a Uniform Application for Securities Industry Registration ("Form U-4") which provided for arbitration of all employment disputes.

PARTIES TO THE PROCEEDING

The petition accurately lists the parties to the proceeding.

STATEMENT PURSUANT TO RULE 29.6

Pursuant to Supreme Court Rule 29.6, Respondent, John Nuveen & Company, Inc., states that it is a wholly-owned subsidiary of the John Nuveen Company. The John Nuveen Company, in turn, is a majority-owned subsidiary of the St. Paul Companies.

Respondent has no nonwholly owned subsidiaries.

TABLE OF CONTENTS

	Page
Question Presented	i
Parties to the Proceeding	ii
Statement Pursuant to Rule 29.6	ii
Table of Contents	iii
Table of Cited Authorities	v
Statutes Involved	1
Statement of the Case	1
Reasons for Denying the Writ	1
I. The Petition Raises No Error In The Court Of Appeals' Decision.	1
A. The Court Of Appeals Properly Applied State Contract Law To Petitioner's Arbitration Agreement Instead Of A Heightened "Knowing and Voluntary" Standard.	1
B. The Court Of Appeals Properly Denied Plaintiff's Request To Conduct Discovery Into The Adequacy Of The NASD's Arbitration Scheme Because Its System Is Adequate And Effective Judicial Review Is Available.	3

Contents

Page

C. The Court Of Appeals Properly Concluded That Section 118 Of The Civil Rights Act Of 1991 Endorsed Arbitration. 5

II. The Decision Of The Court Of Appeals Will Have Limited Precedential Value Because Both The NASD And The NYSE Have Abandoned Mandatory Arbitration Of Statutory Employment Claims. 9

III. The Circuit Split Created By *Duffield* Has Been Resolved By Changes To The NASD's And NYSE's Arbitration Rules. 11

Conclusion 13

TABLE OF CITED AUTHORITIES

Page

Cases:

Armijo v. Prudential Ins. Co. of America, 72 F.3d 793 (10th Cir. 1995) 6

Austin v. Owens-Brockway Glass Container, Inc., 78 F.3d 875 (4th Cir.), *cert. denied*, 117 S. Ct. 432 (1996) 6, 8

Bercovitch v. Baldwin School, Inc., 133 F.3d 141 (1st Cir. 1998) 7

Casey v. Planned Parenthood of Pennsylvania, 14 F.3d 848 (3d Cir.), *stay denied*, 510 U.S. 1309 (1994) .. 13

Cirillo v. Arco Chemical Co., 862 F.2d 448 (3d Cir. 1988) 2

Cole v. Burns Int'l Security Services, 105 F.3d 1465 (D.C. Cir. 1997) 4, 5, 6

Donohoe v. Consolidated Operating & Production Corp., 30 F.3d 907 (7th Cir. 1994) 13

Duffield v. Robertson Stephens & Co., 144 F.3d 1182 (9th Cir.), *cert. denied*, 119 S. Ct. 465 (1998) 5, 7, 8, 11, 12

First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938 (1995) 2, 5

Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991) 1, 2, 3, 4, 5, 9, 10

Johnson v. Hubbard Broadcasting, Inc., 940 F. Supp. 1447 (D. Minn. 1996) 8

Cited Authorities

Page

Matthews v. Rollins Hudig Hall Co., 72 F.3d 50 (7th Cir. 1995) 6

McWilliams v. Logicon, Inc., 143 F.3d 573 (10th Cir. 1998) 7

Miller v. Public Storage Management, Inc., 121 F.3d 215 (5th Cir. 1997) 7

Mouton v. Metropolitan Life Ins. Co., 147 F.3d 453 (5th Cir. 1998) 6

Nieminski v. John Nuveen & Co., No. 96 C 1960, 1997 WL 43241, at *6 (N.D. Ill. Jan. 23, 1997) 3

Patterson v. Tenet Healthcare, Inc., 113 F.3d 832 (8th Cir. 1997) 6

Robertson, Stephens & Co. v. Duffield, __ U.S. __, 119 S. Ct. 465 (1998) 12

Wright v. Universal Maritime Service Corp., __ U.S. __, 119 S. Ct. 391 (1998) 2

Statutes:

Americans with Disabilities Act, 42 U.S.C. § 12212 .. 7

Civil Rights Act of 1991, Pub. L. 102-166, § 118 ..... 1, 5, 6, 7

Federal Arbitration Act, 9 U.S.C. § 1 *et seq.* 1, 2, 4

Cited Authorities

Page

Other Authorities:

58 Fed. Reg. 39070 (July 21, 1993) (SEC Release No. 34-32639) 4

62 Fed. Reg. 66164 (Dec. 17, 1997) (SEC Release No. 34-39421) 10

63 Fed. Reg. 35299 (June 29, 1998) (SEC Release No. 34-40109) 10, 12, 13

63 Fed. Reg. 52782 (Oct. 1, 1998) (SEC Release No. 34-40479) 10, 11

H.R. Rep. No. 40(II), 102d Cong., 1st Sess. 78 (1991), *reprinted in* 1991 U.S.C.C.A.N. 694 8

Aaron Lucchetti, *NASD, Amex Complete Marriage*, WALL ST. J., November 3, 1998 11

NASD Code of Arbitration Procedure, NASD Manual (CCH) Rule 10000 *et seq.* (1997) 3, 9, 10, 12

Petition for Writ of Certiorari, *Robertson, Stephens & Co. v. Duffield*, __ U.S. __, 119 S. Ct. 465 (1998) (No. 98-237) 12

APPENDIX

Page

Appendix A — Approved Changes to National Association of Securities Dealers Code of Arbitration Procedure 1a

Appendix B — Proposed Changes to New York Stock Exchange Arbitration Rules 2a

STATUTES INVOLVED

The following statutes are involved in this case: Section 118 of the Civil Rights Act of 1991, Pub. L. 102-166, *reprinted in* notes to 42 U.S.C. § 1981 ("Section 118") and the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.* ("FAA").

STATEMENT OF THE CASE

Respondent, John Nuveen & Company, Inc. ("Nuveen"), incorporates by reference the statement of facts of the court below, reprinted in the Appendix to the Petition at 2a-4a.

REASONS FOR DENYING THE WRIT

I.

THE PETITION RAISES NO ERROR IN THE COURT OF APPEALS' DECISION.

This Court should not grant the petition because the Court of Appeals' decision was faithful to *Gilmer v. Interstate/ Johnson Lane Corp.*, 500 U.S. 20 (1991) and consistent with the majority of circuit courts concluding that agreements to arbitrate statutory employment discrimination claims are enforceable.

A. The Court Of Appeals Properly Applied State Contract Law To Petitioner's Arbitration Agreement Instead Of A Heightened "Knowing and Voluntary" Standard.

Petitioner continues to characterize as *substantive* her right to have her Title VII and ADEA claims heard in federal court. Pet. at 15.[1] With that characterization, Petitioner maintains that

1. Petitioner's Petition for Writ of Certiorari and Appendix thereto are cited as "Pet. at __" and "Pet. App. at __a," respectively.

arbitration agreements which embrace statutory employment claims must be subjected to a higher level of scrutiny than that reserved for other kinds of contracts. Pet. at 15.

This Court, however, recently made clear that the right to proceed in a judicial forum is not *substantive*. *See Wright v. Universal Maritime Service Corp.*, __ U.S. __, 119 S. Ct. 391, 396 (1998); *see also Gilmer*, 500 U.S. at 26 ("By agreeing to arbitrate a statutory claim, a party does not forgo substantive rights afforded by the statute. . . ."). Therefore, cases such as *Cirillo v. Arco Chemical Co.*, 862 F.2d 448 (3d Cir. 1988), which articulate and apply a heightened "knowing and voluntary" standard to the release — as opposed to the arbitration — of substantive rights, are inapplicable.[2]

Therefore, having found an agreement to arbitrate in the language of Petitioner's Form U-4, Pet. App. at 3a, the Court of Appeals appropriately limited further inquiry into the circumstances of its execution to those that would have affected the formation of any other contract under state law. *See First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995) (under the FAA, inquiries into the enforceability of arbitration agreements are to be guided by ordinary state-law principles that govern the formation of contracts generally); *accord*, *Gilmer*, 500 U.S. at 33 (arbitration agreements are to be enforceable "save upon such grounds as exist at law or in equity for the revocation of any contract") (quoting 9 U.S.C. § 2). Because the Court of Appeals found no evidence in the record of "fraud, duress, mistake or some other ground recognized by

---

2. Indeed, *Wright* made clear that the lesser "clear and unmistakable" standard applicable to collectively-bargained arbitration agreements is not applicable where an individual waives his own right to proceed judicially. *Wright*, 119 S. Ct. at 396-97 (distinguishing *Gilmer* and finding an agreement to arbitrate "any dispute, claim or controversy" in individual context sufficient to embrace federal statutory claims).

the law applicable to contracts generally [which] would have excused the district court from enforcing Seus' agreement," Pet. App. 15a, it properly affirmed the district court's order compelling arbitration.

B. The Court Of Appeals Properly Denied Plaintiff's Request To Conduct Discovery Into The Adequacy Of The NASD's Arbitration Scheme Because Its System Is Adequate And Effective Judicial Review Is Available.

Petitioner also maintains that she was wrongfully denied discovery into the adequacy of the NASD's arbitration scheme prior to dismissal by the district court. Pet. at 5-9. However, the decision to compel arbitration without prospective inquiry was correct and consistent with *Gilmer* because the NASD's procedures are adequate to protect Petitioner's substantive statutory rights and significant judicial review is available should Petitioner be unable to vindicate those rights.

Far from simply acknowledging that an arbitration clause exists and compelling arbitration without any consideration of the arbitral process at issue, both the Court of Appeals and the district court carefully considered the adequacy of NASD arbitration. Pet. App. at 23a, 36a-38a. Both noted that the NASD Code of Arbitration Procedure is detailed and that its procedures mirror those of the NYSE, which this Court previously found in *Gilmer* to be adequate. Pet. App. at 23a, 36a-38a; *see NASD Code of Arbitration Procedure*, NASD Manual (CCH) Rule 10000 *et seq.* (1997) ("NASD Code"); *see also Nieminski v. John Nuveen & Co.*, No. 96 C 1960, 1997 WL 43241, at *6 (N.D. Ill. Jan. 23, 1997) (comparing specific arbitration provisions of the NYSE and NASD). In addition to its other provisions, the NASD Code also contains substantial safeguards against arbitral bias — Petitioner's primary concern throughout this litigation — including:

- disclosure of the arbitrators' backgrounds, disclosure of circumstances which might preclude an arbitrator from rendering an impartial decision, peremptory challenges and challenges for cause. NASD Code, Rules 10310-10312.

- a requirement that arbitration panels considering statutory employment disputes contain a majority of arbitrators not from the securities industry. *See* NASD Code, Rules 10202 & 10308; *see also* 58 Fed. Reg. 39070, 39071 (July 21, 1993) (SEC Release No. 34-32639) (NASD statement accompanying Code amendments recognizing public policy implications of claims of employment discrimination).

In light of these detailed provisions protecting Petitioner's substantive rights and their functional equivalence to those examined in *Gilmer*, Petitioner's request to depose the NASD was properly denied.

Petitioner's request was also properly denied because sufficient judicial review remains available to her in the unlikely event she is mistreated during the arbitration process. The D.C. Circuit recognized in *Cole v. Burns Int'l Security Services*, 105 F.3d 1465 (D.C. Cir. 1997) that both the FAA and case law provide for meaningful judicial review of public law issues decided by arbitrators. *See Cole*, 105 F.2d at 1486. The FAA, itself, provides that arbitration awards can be vacated on several grounds. *See* 9 U.S.C. § 10(a) (*e.g.*, fraud, partiality, corruption, arbitrator misconduct, refusal to hear evidence and any other misbehavior by which the rights of any party may have been prejudiced). In addition to the grounds set forth in the FAA, courts may also set aside arbitration awards if they are contrary

to "some explicit public policy" that is "well defined and dominant" and determined "by reference to the laws and the legal precedents." *Cole*, 105 F.3d at 1486. This Court has also indicated that arbitration awards can be vacated if they are in "manifest disregard of the law." *See First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 942 (1995); *see also Gilmer*, 500 U.S. at 32 n.4 ("[A]lthough judicial scrutiny of arbitration awards necessarily is limited, such review is sufficient to ensure that arbitrators comply with the requirements of the statute at issue.") (citation and internal quotes omitted).

Because sufficient judicial review of arbitral decisions is available, substantial, prospective inquiry by the court below into the adequacy of the NASD's arbitration scheme was unnecessary.

C. The Court Of Appeals Properly Concluded That Section 118 Of The Civil Rights Act Of 1991 Endorsed Arbitration.

Both this case, and the Ninth Circuit's decision in *Duffield v. Robertson Stephens & Co.*, 144 F.3d 1182 (9th Cir.), *cert. denied*, 119 S. Ct. 465 (1998), raise the issue of whether Section 118 of the Civil Rights Act of 1991, Pub. L. 102-166, *reprinted in* notes to 42 U.S.C. § 1981 ("Section 118"), manifests a Congressional intent to preclude mandatory arbitration of statutory discrimination claims. The Ninth Circuit in *Duffield* concluded that it does, and Petitioner urges the Court to adopt *Duffield*'s evisceration of *Gilmer* based on that provision. Pet. at 15-16. The weight of circuit court authority, however, is to the contrary and reveals that the Court of Appeals properly interpreted Section 118 as a Congressional endorsement of arbitration as a method of resolving federal discrimination claims.

Section 118's terms are clear and unambiguous:

> Where appropriate and to the extent authorized by law, the use of alternative means of dispute resolution including settlement negotiations, conciliation, facilitation, mediation, factfinding, minitrials, and *arbitration* is encouraged to resolve disputes arising under the Acts or provisions of Federal law amended by this title (emphasis added).

With the exception of the Ninth Circuit, every circuit court to have expressly considered this language — the Fourth, Seventh and Eighth — has interpreted Section 118 literally and concluded that it encourages the use of arbitration to resolve Title VII and ADEA claims. *See Austin v. Owens-Brockway Glass Container, Inc.*, 78 F.3d 875, 881 (4th Cir.), *cert. denied*, 117 S. Ct. 432 (1996) ("The language of [Section 118] could not be any more clear in showing Congressional favor towards arbitration."); *Matthews v. Rollins Hudig Hall Co.*, 72 F.3d 50, 54 n.4 (7th Cir. 1995) ("[T]he Civil Rights Act of 1991 encouraged the use of arbitration to resolve ADEA claims.") (citing Section 118); *Patterson v. Tenet Healthcare, Inc.*, 113 F.3d 832, 837 (8th Cir. 1997) ("[T]he arbitrability of Title VII claims finds support in the Civil Rights Act of 1991.") (citing Section 118).

Three other circuits — the Fifth, Tenth and the District of Columbia — deciding cases filed after passage of Section 118 have impliedly reached the same conclusion, albeit without explicit discussion of Section 118. *See Mouton v. Metropolitan Life Ins. Co.*, 147 F.3d 453, 455 (5th Cir. 1998) (Title VII claims compelled to arbitration); *Armijo v. Prudential Ins. Co. of America*, 72 F.3d 793, 797-98 (10th Cir. 1995) (same); *Cole v. Burns Int'l Security Services*, 105 F.3d 1465, 1472-73 (D.C. Cir. 1997) (same).

Finally, three circuits — the First, Fifth and Tenth — have interpreted virtually identical language contained in the Americans with Disabilities Act[3] as manifesting Congressional intent to encourage arbitration. *See Bercovitch v. Baldwin School, Inc.*, 133 F.3d 141, 151 (1st Cir. 1998) ("The meaning of [42 U.S.C. § 12212], far from evidencing an intention to preclude arbitration, can only be interpreted as favoring it."); *Miller v. Public Storage Management, Inc.*, 121 F.3d 215, 218 (5th Cir. 1997) ("[t]he explicit language of the ADA advocates the use of alternative dispute resolution. . . .") (citing 42 U.S.C. § 12212); *McWilliams v. Logicon, Inc.*, 143 F.3d 573, 576 (10th Cir. 1998) ("In fact, the Act encourages arbitration of Americans with Disabilities disputes") (citing 42 U.S.C. § 12212).

Against these decisions from *six* other circuits, the Ninth Circuit in *Duffield* stands alone in its conclusion that Section 118 prohibits arbitration of statutory employment disputes. *Duffield*'s interpretation, however, is predicated entirely on a judicial odyssey through Section 118's legislative history designed from the outset to reach a construction of the statute clearly in conflict with its unambiguous terms. *See Duffield*, 144 F.3d at 1195-99.[4] The Court of Appeals properly declined

---

3. 42 U.S.C. § 12212 provides:

> Where appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including settlement negotiations, conciliation, facilitation, mediation, factfinding, minitrials, and arbitration, is encouraged to resolve disputes arising under this chapter.

4. The Ninth Circuit's reading of Section 118's legislative history is also suspect. As the court below observed, "there is ample legislative history to support a straightforward reading of the text of § 118." Pet. App. 13a n.1. For example, the Report of the House Committee on the Judiciary explains Section 118 as follows:

(Cont'd)

to follow the Ninth Circuit's lead. Indeed, as the Fourth Circuit in *Austin* admonished:

> Even if the provisions of the legislative history are contrary to the statute, the statute must prevail. . . . Especially in that event, the reasoning of Justice Scalia, concurring, in *Thompson v. Thompson*, 484 U.S. 174, 188, 191-92, 108 S. Ct. 513, 520-21, 522, 98 L. Ed. 2d 512 (1988) should apply: "Committee reports, floor speeches, and even colloquies between Congressman, . . . are frail substitutes for bicameral vote upon the text of a law and its presentment to the President."

Austin, 78 F.3d at 882 (citation omitted); *see also Johnson v. Hubbard Broadcasting, Inc.*, 940 F. Supp. 1447, 1458 (D. Minn. 1996) (a court can cite legislative history to support practically any proposition).

(Cont'd)

> This section "encourages" the voluntary use of conciliation, mediation, arbitration, and other methods of resolving disputes under Civil Rights laws governing employment discrimination.
>
> We agree that voluntary mediation and arbitration are far preferable to prolonged litigation for resolving employment discrimination claims. . . .
>
> We recognize that mediation, knowingly and voluntarily undertaken, are the preferred methods of settlement of employment discrimination disputes.

H.R. Rep. No. 40(II), 102d Cong., 1st Sess. 78 (1991), *reprinted in* 1991 U.S.C.C.A.N. 694, 764. Significantly, the Ninth Circuit cites none of this contrary legislative history in its discussion. *See Duffield*, 144 F.3d at 1195-99.

II.

THE DECISION OF THE COURT OF APPEALS WILL HAVE LIMITED PRECEDENTIAL VALUE BECAUSE BOTH THE NASD AND THE NYSE HAVE ABANDONED MANDATORY ARBITRATION OF STATUTORY EMPLOYMENT CLAIMS.

But even were this Court inclined to grant the petition to correct a perceived error in the Court of Appeals' decision, the petition should nevertheless be denied because its decision has virtually no precedential effect.

This case arises in the unique — and now historical — context of a securities firm requesting a court to compel to arbitration the statutory discrimination claims of one of its employees because she signed an industry-wide registration application (Form U-4) requiring her to arbitrate:

> any dispute, claim or controversy that may arise between me and my firm . . . that is required to be arbitrated under the rules, constitutions, or by-laws of the organizations with which I register . . . .

Pet. App. at 3a (quoting Form U-4); *see Gilmer*, 500 U.S. at 23 (same).

At the time the Court of Appeals rendered its decision, both the National Association of Securities Dealers ("NASD") and the New York Stock Exchange ("NYSE") required employees of member firms to arbitrate all statutory employment disputes against their employers. NASD Rule 10101 provided for the arbitration of "any dispute, claim, or controversy . . . arising out of the employment or termination of employment of associated person(s) with any member. . . ." Pet. App. at 3a (quoting *NASD Manual — Code of Arbitration*

Procedure Rule 10101 (formerly § 1) (1997)); *see also* 62 Fed. Reg. 66164, 66165 (Dec. 17, 1997) (SEC Release No. 34-39421) (quoting NASD Rule 10101). Similarly, NYSE Rule 347 provided for the arbitration of:

> [a]ny controversy between a registered representative and any member or member organization arising out of the employment or termination of employment of such registered representative.

Gilmer, 500 U.S. at 23; *see also* 63 Fed. Reg. 52782, 52782 n.3 (Oct. 1, 1998) (quoting NYSE Rule 347).

However, on June 22, 1998, two weeks after the Court of Appeals issued its decision in this matter, the Securities and Exchange Commission ("SEC") approved a major change to the NASD's Code of Arbitration Procedure, eliminating the requirement that registered representatives arbitrate employment discrimination claims. *See* 63 Fed. Reg. 35299, 35303 (June 29, 1998) (SEC Release No. 34-40109). The NASD rule change goes into effect on January 1, 1999. *Id.* The text of the approved rule change is reprinted in Appendix A hereto at 1a.

The NYSE quickly followed suit, filing with the SEC on September 24, 1998 proposed amendments to NYSE Rules 347 and 600 to exclude from mandatory arbitration any claim of employment discrimination, including a claim of sexual harassment, unless the parties have agreed to arbitrate the claim *after it has arisen*. *See* 63 Fed. Reg. 52782, 52782 (Oct. 1, 1998) (SEC Release No. 34-40479). The text of the NYSE's proposed rule changes is reprinted in Appendix B hereto at 2a.[5]

---

5. SEC approval of the NYSE's proposed rule changes is imminent. Indeed, the NYSE filed its proposed rule changes in response to SEC (Cont'd)

Because the country's two largest securities exchanges which previously required arbitration of statutory discrimination claims have now abandoned that requirement,[6] the decision of the Court of Appeals below is of historical significance only. It would be a waste of this Court's scarce judicial resources to review for error a decision which is now, for all intents and purposes, without precedential value in the securities industry.

III.

THE CIRCUIT SPLIT CREATED BY *DUFFIELD* HAS BEEN RESOLVED BY CHANGES TO THE NASD'S AND NYSE'S ARBITRATION RULES.

One month prior to the Court of Appeals' decision in this case, the Ninth Circuit decided *Duffield v. Robertson Stephens & Co.*, 144 F.3d 1182 (9th Cir. 1998). Although reaching a contrary result, *Duffield* presented facts functionally indistinguishable from those presented here. Like Petitioner, Tonja Duffield was an employee of a member of the NASD who was required as a condition of her employment to sign a Form U-4. *Id.* The arbitration clause contained in that Form U-4 obligated her to "arbitrate any dispute, claim or controversy

---

(Cont'd)

Chairman Arthur Levitt's suggestion that all national securities exchanges "promptly change their rules to conform to those of the NASD." 63 Fed. Reg. at 52783 & n.10 (quoting SEC News Release 98-61, June 23, 1998).

6. On November 2, 1998, the country's third largest securities exchange, the American Stock Exchange ("Amex"), announced the completion of its merger with the NASD. Aaron Lucchetti, *NASD, Amex Complete Marriage*, WALL ST. J., November 3, 1998, at C1. Pursuant to that merger, the Amex became a wholly-owned subsidiary of the NASD, *id.*, presumably ending mandatory arbitration of discrimination claims in that organization as well.

. . . that is required to be arbitrated under the rules, constitutions, or by-laws of the organizations with which I register. . . ." *Id.* Like Respondent, Robertson Stephens & Company, relying on Duffield's Form U-4 and § 1 (now Rule 10101) of the NASD Code of Arbitration Procedure, sought to compel arbitration of her sex discrimination and sexual harassment claims brought under Title VII. *Id.* at 1186. Unlike the Third Circuit in this case, however, the Ninth Circuit reversed the district court's order compelling arbitration, concluding that Congress intended in enacting the Civil Rights Act of 1991 to preclude the compulsory arbitration of statutory employment claims. *Id.* at 1202-03.

On August 4, 1998, Robertson Stephens petitioned this Court to review the Ninth Circuit's decision, primarily to resolve the split between the Ninth and Third Circuits. *See* Petition for Writ of Certiorari at 9-10, *Robertson, Stephens & Co. v. Duffield*, __ U.S. __, 119 S. Ct. 465 (1998) (No. 98-237). Petitioner makes the same request here. Pet. at 15-16.

On November 9, 1998, however, this Court denied Robertson Stephens' petition. *Robertson, Stephens & Co. v. Duffield*, __ U.S. __, 119 S. Ct. 465 (1998). Petitioner articulates no compelling reason in her petition why this case should be treated differently. Nor could she. With the recent rule changes governing securities industry arbitration, *supra* at pp. 9-11, the difference of opinion between the Ninth and Third Circuits over the effect of signing a Form U-4 on an employee's subsequent right to pursue statutory discrimination claims in federal court is of no practical significance for future litigants.[7]

---

7. Petitioner, however, must arbitrate *her* claims before the NASD, notwithstanding the NASD's recent rule change. NASD Regulation, Inc. has stated that the rule change applies only to claims filed on or after January 1, 1999 — the effective date of the change. *See* 63 Fed. Reg. at

(Cont'd)

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted,

EDWARD C. JEPSON, JR.
Counsel of Record
JAMES E. BAYLES, JR.
VEDDER, PRICE, KAUFMAN
& KAMMHOLZ
Attorneys for Respondent
222 North LaSalle Street
Suite 2600
Chicago, Illinois 60601
(312) 609-7500

(Cont'd)

35301, 35302. Because Petitioner filed her claims in federal court on August 29, 1996, the rule change does not apply to her. Moreover, under the mandate rule, the Court of Appeals' affirmance of the order compelling arbitration is binding on the district court. *See Casey v. Planned Parenthoed of Pennsylvania*, 14 F.3d 848, 856 (3d Cir.) ("an inferior court has no power or authority to deviate from the mandate issued by an appellate court") (citation and internal quotes omitted), *stay denied*, 510 U.S. 1309 (1994); *accord, Donohoe v. Consolidated Operating & Production Corp.*, 30 F.3d 907, 910 (7th Cir. 1994) (same).

APPENDIX

APPENDIX A — APPROVED CHANGES TO NATIONAL ASSOCIATION OF SECURITIES DEALERS CODE OF ARBITRATION PROCEDURE

Approved Changes to National Association of Securities Dealers Code of Arbitration Procedure

10201. Required Submission

(b) A claim alleging employment discrimination, including a sexual harassment claim, in violation of a statute is not required to be arbitrated. Such a claim may be arbitrated only if the parties have agreed to arbitrate it, either before or after the dispute arose.

Italics indicate new language.

* * *

APPENDIX B — PROPOSED CHANGES TO NEW YORK STOCK EXCHANGE ARBITRATION RULES

Proposed Changes to New York Stock Exchange Arbitration Rules

Rule 347.

(a) Except as provided in paragraph (b), [A]*any* controversy between a registered representative and any member or member organization arising out of the employment or termination of employment of such registered representative by and with such member or member organization shall be settled by arbitration, at the instance of any such party, in accordance with the arbitration procedure prescribed elsewhere in these rules.

(b) A claim alleging employment discrimination, including any sexual harassment claim, in violation of a statute shall be eligible for arbitration only where the parties have agreed to arbitrate the claim after it has arisen.

Rule 600.

(f) Any claim alleging employment discrimination, including any sexual harassment claim, in violation of a statute shall be eligible for submission to arbitration under these Rules only where the parties have agreed to arbitrate the claim after it has arisen.

Brackets indicate deleted language; italics indicate new language.

* * *